No. 2741

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. L. SPALDING and THE RELIANCE MINING COMPANY, a Corporation,
Appellants.

VS.

S. A. MARTIN,
Appellee.

Appeal from United States District Court, Territory of Alaska, Fourth Division.

BRIEF ON BEHALF OF APPELLANTS

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STATEMENT OF THE CASE.

This is a suit in equity, filed by S. A. Martin, for himself and as assignee of thirteen other laborers and other creditors of W. L. Spalding, to foreclose liens on the Soo quartz mining claim, one of a group of properties owned by the Reliance Mining Company, a corporation, and situate in the Fairbanks Mining and Recording Precinct, Fourth Judicial Division, Territory of Alaska. The suit was filed on 23 January, 1914 (erroneously stated in the summons as 1913) and contains twenty-seven causes of action, thirteen of said number being based upon labor performed by plaintiff and his assignors for a period

roughly speaking commencing in July 1913 and ending 8 October, 1913, represented by causes of action Nos. 1, 3, 5, 7, 9, 11, 13, 2nd 14, 16, 18, 20, 22, and 25, and thirteen causes of action for a period commencing with 9 October, 1913, and ending 10 November, 1913, and one cause of action No. 24 being for a period from 3 August, 1913 to 1 November, 1913; most of the men who worked during the first period having also worked during the second period, and having filed seperate liens for each period, the reason therefor being fully explained hereafter.

The defendants Spalding, Brumbaugh, and the Reliance Mining Company, each appeared separately and moved to strike out certain portions of each separate cause of action (Tr., pp. 196, 212) and likewise to make each of said causes of action more definite and certain (Tr., pp. 213-214.) Separate demurrers were likewise interposed (Tr., pp. 216, 224) by defendants and likewise overruled and exceptions taken and allowed (Tr., p. 225).

Thereafter, separate answers were filed by the defendants, that of the Reliance Mining Company being a general denial of the essential allegations of each cause of actin (Tr., pp. 225, 227) and setting forth as an affirmative defense that, prior to the commencement of any work described in the complaint, by plaintiff or his assignors, the defendant Reliance Mining Company, the owner of the property, caused to be posted upon said Soo quartz mining claim, at the times and places and in the manner prescribed by law, notices in writing, disclaiming any

responsibility for any debts contracted or incurred by any lessees or laymen working or operating on said Soo mining claim, and for any material furnished (Tr., pp. 227-228.) The answering defendants Spalding and Brumbaugh made general denial of all the essential allegations of the complaint (Tr., pp. 229, 231.)

Thereafter a reply was filed by the plaintiff, denying the affirmative matter set forth in the answer of the Reliance Mining Company (Tr. pp. 232, 233.)

The case then went to trial and findings of fact and conclusions of law were signed and filed, the Court finding in favor of plaintiff and against defendants Spalding and the Reliance Mining Company on the various causes of action based on the liens for labor performed prior to 8 October, 1913, and against the plaintiff upon all liens for labor performed subsequent to 8 October, 1913, and generally in favor of the defendant Brumbaugh and against the plaintiff.

Thereafter judgment was entered against the defendants Spalding and the Reliance Mining Company for the sum of $4,125.25 and costs and ordering a foreclosure of liens upon *all* of the Soo quartz mining claim and the quartz mill, machinery, tools and plant situate thereon.

The action is based upon an act of the territorial legislature of Alaska, passed at its first session, held in 1913, and entitled "*An act to create, establish, and provide for liens on mines in favor of laborers and materialmen, and repealing all acts and parts of acts in conflict herewith.*" being chapter 79 of the Session Laws of 1913

of the territorial legislature of Alaska, which said act is hereinafter set forth in full in the Argument.

The facts as developed at the trial, briefly stated, are as follows:

The Reliance Mining Company, a corporation, was, and is now, the owner of a number of quartz claims situate on Dome Creek, in the Fairbanks Recording Precinct, Fourth Judicial Division, Territory of Alaska, and on 13 May, 1912, in writing, leased to W. L. Spalding, John Letterman, and Clifford Post a portion of the Soo claim, one of the group, described as "*Beginning at the westerly end thereof on the line between said Soo claim and the Wild Rose claim and running thence easterly a distance of* 300 *feet along the vein or lode heretofore discovered and exposed n said ground, and extending vertically for a distance of* 100 *feet; the portion herein leased being a block* 300 *feet in length and* 100 *feet in depth on said vein or lode on which the lessees are now engaged in working; together with the necessary tools, machinery, and buildings now situate on said property and belonging to lessor.*" (Tr., p. 253).

The term of the lease was from date thereof until *1 July, 1913*, and one of the conditions of the lease was that

"*For and in consideration of services rendered by lessees in opening and developing said property, said lessees shall retain all the gold and other precious metals and minerals extracted from the portion of said ledge herein leased to them and need not pay to lessor any*

part or portion thereof." (Tr., p. 253.)

Thereafter, by certain mesne conveyances, made prior to July, 1913, the lessee Spalding absorbed the interests of his co-lessees and became the sole owner of said lease (Tr., p. 253).

On 16 September, 1912, the lessor by resolution of its board of directors extended the term of said lease to 1 January, 1914 (Tr., pp. 258-259).

On 9 June, 1913, the Reliance Mining Company executed and delivered to said Spalding a new lease, covering all the Soo mining claim, the life of said lease being ten years from the date thereof and being expressly made subject to *"all outstanding leases on said mining claim or any portion thereof, whether the same have expired or expire at some time in the future, and the lease is accepted by said lessee expressly subject to the right of all persons now holding leases on said property or any part thereof"* (Tr., p. 239). Said lease reserved as rental and royalties to lessor ten per cent. of the gross output of the mine. (Tr., p. 241).

In the month of January, 1913, the Reliance Mining Company prepared three notices of non-liability, as prescribed by the laws of the Territory of Alaska then in force in Alaska (Compiled Laws of Alaska, sec. 694, quoted in full hereafter), disclaiming any liability for services rendered or supplies furnished to lessees, and duly signed the same by the name of the company and its duly authorized officers, and caused said notices to be posted on the ground (Tr., p. 249) where the work

was being carried on. All three of said notices remained posted in conspicuous places on said claim for many months after plaintiff and his assignors went to work thereon, and two at least remained so posted until after the lien claimants in this action had ceased labor on said claim, and were seen and read by the lien claimants (Tr., pp. 247, 248, 269, 261, 263, 264, 266, 267).

Subsequent to the time when said notices were posted, the legislature of Alaska, at its first session, enacted another lien law, as set forth hereafter in the Argument, under the terms of which act the owners of the property under lease are required to set forth, in any notices of non-liability posted by them, in addition to the data required by the provisions of the general law in force when the notices were originally posted, a statement that the lease had been *recorded* and giving the volume and page of the record where recorded, *the name of the lessee*, etc. (Act hereafter set forth in full). This act went into effect on *30 July, 1913*, after several of the lien claimants had begun to work and while the lessee Spalding was working under a *verbal* extension of the original lease granted by the resolution of the board of directors of the lessor corporation, not endorsed n the original lease that had expired on *1 July, 1913*, before any of the lien claimants had gone to work.

At the time of the execution of the original lease and the passage of the resolution extending the term thereof, there was no provision of the Alaska law requiring the recording of such a lease or the extension thereof, and an

oral lease or extension of a written lease for a period not exceeding one year was not forbidden by the statute of frauds then and now in effect in Alaska. (Compiled Laws of Alaska, sec. 1876, sub-div. 6. See Argument).

No new notices of non-liability were posted by the lessor corporation after the act of the legislature pertaining to liens went into effect on 30 July, 1913.

The work being performed on the mine during the period covered by the liens was *all on the northerly 300 feet by 100 feet in depth*, as provided by the original lease, and no royalties would be due to the lessors until after 1 January, 1914, unless lessee worked on some portion of the claim other than the part covered by the original lease, and this he had not done Royalties would be due after 1 January, 1914, under the lease of June, 1913.

About 8 October, 1913, the lessee Spalding became involved in financial troubles and was unable to pay his employes and other creditors, and thereupon, under an agreement with his employees, Spalding and his employees, from that date until the mine was finally shut down in November, worked together as *partners*, the men to get all the gold extracted. It was for liens covering this period that the Court held that the men were not entitled to any liens, and no appeal has been taken from that portion of the judgment. The Court entered judgment for all the labor performed before 8 October, 1913, subsequent to July 29, 1913, including the labor of the cook, a Mrs. Deck, who did nothing but cook, and for

the use of a team belonging to William Ahlmark, and for all labor performed by any of the claimants regardless of whether it was *prospecting* or *development* work or *actual mining work,* and this appeal is taken from that portion of the decree foreclosing the liens for labor, etc, performed prior to 8 October, 1913, and ordering *all* of the claim and certain personal property sold to satisfy the same, which said decree was entered over the objections and exceptions of the defendants Spalding and the Reliance Mining Company.

The Honorable F. E. Fuller presided at the trial of the case and signed the findings of fact and conclusions of law, but resigned before judgment was signed. His successor, Honorable Charles E. Bunnell, signed the judgment.

ASSIGNMENT OF ERROR.

The Appellant relies upon the following error, viz:—

I.

The court erred in denying defendant's motion to strike paragraphs VI, VIII and IX of each of plaintiff's twenty-seven separate causes of action set forth in his complaint on file in said action.

II.

The Court erred in denying defendants' motion to strike plaintiff's Exhibits A, A 1, B, B 1, C, C 1, D, D 1, E, E 1, F, F 1, G, G 1, H H 1, I, I 1, J, J 1, K, K 1, L, L 1, M, N, N 1, attached to plaintiff's complaint and referred to in said separate causes of action.

III.

The Court erred in refusing to grant defendants' motion to require plaintiff to make his complaint more definite and certain by setting forth in paragraph V of plaintiff's first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fourteenth (2), fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second twenty-third, twenty-fourth, twenty-fifth, and twenty-sixth causes of action, and each of them, what portion of the labor described therein was performed in running tunnels, what portion in opening stopes, what portion in working and extracting the ore from said mine and what portion in developing and improving said mine and what portion in milling the ore taken therefrom, and in what way said labor so alleged to have been performed was of the value to said mining property alleged therein.

IV.

The Court erred in overruling the defendant's demurrer to the following causes of action contained in the complaint herein, and to each of said causes of action, to-wit: the first, third, fifth, seventh, ninth, eleventh, thirteenth, the second cause of action designated as the fourteenth, sixteenth, eighteenth, twentieth, twenty-second,, twenty-fourth and twenty-fifth.

V.

The Court erred in overruling and refusing to allow defendants' proposed amendment to the first finding of

fact prposed by plaintiff, which amendment is as follows, to-wit:

"In paragraph I of the findings of fact proposed by the attorney for the above named plaintiff, amend the same so it shall read as follows: 'That at all the times herein mentioned and up to and including the 8th day of October, 1913, the defendant W. L. Spalding was in possession of and prospecting, developing and mining the westerly 300 feet to the depth of 100 feet, of that certain quartz mining claim known as the Soo Quartz Mining Claim."

VI.

The Court erred in refusing to allow and overruling the defendants' proposed amendment to the first finding of fact proposed by plaintiff, which amendment reads as follows: "Amend the last sentence thereof to read as follows: "And that the defendant W. L. Spalding, lessee as aforesaid, operated the westerly 300 feet to the depth of 100 feet of said mine, under the name of the Soo Mining Company."

VII.

The Court erred in refusing to allow the defendants' proposed amendment to the third finding of fact proposed by plaintiff, so that it will appear in said third proposed finding of fact that the word "quartz" written in pen and ink above the word "placer" was at the time of the trial of said action legible and could readily be distinguished.

VIII.

The Court erred in refusing to allow the proposed

amendment of the defendant to the proposed fourth finding of fact proposed by plaintiff, which amendment proposed to strike out all of the said fourth finding of fact reading as follows: "That the failure of the said Reliance Mining Company to post three notices in conspicuous places containing the name or names of the lessee or lessees, or other person or persons, operating said property, the court finds to be conclusive proof of the consent of said owner of said property that its interest in such mining property shall be subject to lien, or liens, for labor performed or material furnished in working, developing or operating on said mining claim," for the reason that the same states a conclusion of law and not any fact found upon the issues in said case.

IX.

The Court erred in refusing to sustain defendants' objection to the fourth finding of fact proposed by plaintiff, upon the ground that the same is not in accordance with the evidence in the case, and for the reason that said last paragraph of said finding does not state any facts found by the Court, but states a conclusion of law.

X.

The Court erred in refusing to allow the amendment proposed by defendants to the fifth finding of fact proposed by plaintiff, which amendment required that the said proposed finding of fact should state that the defendant W. L. Spalding was doing business as the Soo Mining Company, and was lessee of the westerly 300 feet of the Soo Quartz Claim, to a depth of 100 feet,

instead of the lessee of the whole claim, as appears in said finding proposed by plaintiff.

XI.

The Court erred in refusing to strike out in said fifth finding of fact, as proposed by the proposed amendments filed herein, to said fifth finding of fact, by the defendants, all reference in said fifth proposed finding to the ownership of a certain three-stamp quartz mill situated on the Soo Quartz Mine, together with all the fixtures and appliances thereunto belonging, as well as all tools, boiler, hoist, cables, timbers and other appliances used in carrying on mining operations on said mining claim, for the reason that no lien exists on said quartz mill, or any of the personal property or machinery or other appliances, as mentioned in said fifth finding proposed by plaintiff, in favor of the plaintiff or his assignors, or either of them; and for the further reason that the Court does not find as a matter of law that the said mill and all of said other property mentioned in said paragraph V of the fiindings of fact proposed by plaintiff was subject to any lien of plaintiff or his assignors.

XII.

The Court erred in overruling defendants' objection to the sixth proposed finding of fact submitted by plaintiff, for the reason that said finding states that W. L. Spalding employed the plaintiff and his assignors to perform the work mentioned in the complaint, and in the several liens filed in said cause, whereas the said complaint and the liens, and each of them, state that the said plaintiff

and his assignors were employed by W. L. Spalding and Raymond Brumbaugh, members of the mining copartnership operating the Soo Quartz Mining Claim; and in overruling defendants' objection to that portion of said finding of fact which finds that the contract for labor to be performed by Mrs. H. H. Deck was for cooking, for the reason that services as cook are not lienable; and to that portion of thereof which finds that the said Spalding contracted with William Ahlmark to pay $5.00 a day and board for the team therein mentioned, for the reason that said services are not lienable in their nature, and for the further reason that the labors of said Ahlmark and his team are so commingled that they could not be separated and no lien would exist therefor.

XIII.

The Court erred in refusing to allow the proposed amendment to the seventh finding of fact proposed by plaintiff to the effect that there should be stricken from said seventh proposed finding of fact the statement therein contained that the several lien notices upon which the claims of plaintiff and his assignors are based contain "the name of the person by whom said claimant was employed, to-wit, W. L. Spalding," for the reason that the lien notices, copies of which are attached to the complaint herein, show on their face that the persons by whom each of said claimants was employed were W. L. Spalding and Raymond Brumbaugh, doing business under the name of Soo Miningg Company.

XIV.

The Court erred in refusing to sustain defendants' objection to the statement contained in the seventh finding of fact, wherein it is stated that the lien notices filed by the plaintiff and his assignors contain the name of the person by whom said claimants were employed, to-wit, W. L. Spalding, for the reason that each of the liens filed by the plaintiff and his assignors, and also the complaint herein, state that the names of the persons by whom said plaintiff and his assignors were employed were W. L. Spalding and Raymond Brumbaugh, composing the mining copartnership operating the Soo Mining Claim.

XV.

The Court erred in overruling the defendants' objection to the eleventh proposed finding of fact submitted by the plaintiff, to the effect that the plaintiff S. A. Martin is entitled to a lien for the sum of $357.50 upon the Soo Quartz Mining Claim, and upon the other property therein mentioned, for the reason that said statement is not a finding of fact, but a conclusion of law, and for the further reason that there is no law to justify such a finding, as the Act of the Alaska Legislature, under which said liens were filed, is void.

XVI.

The Court erred in overruling defendants' objection to the proposed findings numbered XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, and XXIV, that each of the persons named in said several

paragraphs was entitled to lien upon the property described in each of said paragraphs, for the reason that each of said statements, contained in said several paragraphs, is a statement of a conclusion of law, and is not a statement of fact; and for the further reason that none of said lien claimants is entitled to a lien, as the Act of the Alaska Legislature, under which said liens are claimed, is void.

XVII.

The Court erred in refusing to allow the amendment proposed by defendants to the findings of fact proposed by the plaintiff, numbered from XI to XXIV, inclusive, which proposed amendment would make it appear in each of said findings of fact that the person named therein as claimant is entitled to a lien only on the westerly 300 feet of the Soo Quartz Claim, to a depth of 100 feet, instead of upon the whole claim, as stated in each of said findings of fact proposed by the plaintiff.

XVIII.

The Court erred in refusing to allow the amendment proposed by defendant to the twenty-fourth finding of fact proposed by the plaintiff, which amendment required that there be stricken, from said twenty-fourth finding of fact proposed by plaintiff, the statement that William Ahlmark, one of the plaintiff's assignors, furnished a team of horses at the rate of $5.00 a day between June 30 and October 8, 1913, or at any other time, or at all, for the reason that the services of such team are not lienable.

XIX.

The Court erred in making the first conclusion of law, which is as follows: "That all the claims of the various persons described in the findings of fact down to paragraph XXV constitute a lien upon the premises in said findings of fact described," for the reason that the law under which said liens were attempted to be enforced, being an Act of the Alaska Legislature, was void, and for the further reason that it clearly appears from the evidence that notices of non-liability were posted by the owners of said claim before said men went to work thereon, and that said notices remained posted during all the time said men were employed on said ground and that there was no lien in favor of said men, or any of them, for any work done on said ground.

XX.

The Court erred in entering the second conclusion of law, which was as follows: "That all of said liens were duly assigned and transferred to plaintiff herein, and that plaintiff is entitled to have all of said liens foreclosed herein and that the property described in plaintiff's complaint and in said findings of fact be sold according to law to satisfy said liens," for the reason that there was not at the time said labor was performed, or at the time said fiindings of fact were signed, any law in existence permitting the filing of any of said liens, and the Act of the Alaska Legislature under which said liens were purported to be filed was void, and notice of non-liability as prescribed by the general laws of Alaska had been

posted by the owners prior to the time said men therein referred to commenced work on said ground, and remained posted during all the time said men were employed on said ground, and said finding is against law.

XXI.

The Court erred in refusing to sustain defendants' objection to the first conclusion of law, for the reason that under the findings of fact proposed by plaintiff, the several liens claimed by plaintiff and his assignors are void, for the reason that none of said claims set forth the name of the person or persons by whom the said plaintiff and his assignors were employed, as stated in the finding of fact found by the Court.

XXII.

The Court erred in refusing to sustain defendants' objection to the statement contained in the second conclusion of law proposed by plaintiff to the effect that plaintiff is entitled to have all the liens mentioned in the complaint foreclosed and the property described in the complaint sold, to satisfy said liens, for the reason that under the statements made in the findings of fact, and the evidence produced in this case in behalf of the plaintiff, the said claims of lien are each and all void and of no effect, for the reason that the labor and services, for which the liens are claimed by the plaintiff and his assignors, according to the testimony herein, were not done and performed in the development or improvement of the Soo Quartz Mining Claim, but were done and performed in the course of carrying on mining operations in extracting ore, milling the same, and the ordinary

working operations of the mine.

XXIII.

The Court erred in admitting, over the objection of the defendants, plaintiff's exhibit No. 1, which was a lease from the Reliance Mining Company to W. H. Spalding, dated the 9th day of June, 1913, and set forth in full in the bill of exceptions, which said lease covered all the Soo Quartz Mining Claim described therein, as shown by defendants' exception No. 1.

XXIV.

The Court erred in refusing the defendants' motion to strike out all the testimony of Morton E. Stevens, relative to searching the records and finding no other lease of record than the lease referred to as plaintiff's exhibit No. 1, exception to which is noted in the bill of exceptions as defendants' exception No. 2.

XXV.

The Court erred in refusing to grant defendants' motion for a non-suit at the close of the plaintiff's case, as shown in the bill of exceptions by defendants' exception No. 3.

XXVI.

The Court erred in entering judgment for the plaintiff in said action over the protest of the defendants therein.

XXVII.

The Court erred in refusing to enter judgment in favor of defendants, as requested by said defendants, on the ground that plaintiff had no lien, under the then existing laws in the Territory of Alaska, for the labor described in said lien notices and in said complaint.

XXVIII.

The Court erred in adjudging that the personal property, described in plaintiff's complaint and in the liens attached thereto, should be sold in satisfaction of the judgment rendered in said cause, for the reason that the law of the Alaska Legislature under which said proceedings were instituted and had was void, and there was nothing in the title of said act that related in any way to imposing a lien upon personal property for labor performed on the ground upon which the property was situated.

XXIX.

The Court erred in ordering the personal property sold to satisfy the judgment in this case, for the reason that there is no finding of fact or conclusion of law upon which such an order could be based, and the Court has failed to find that the alleged lien attached to any personal property described in said complaint.

XXX.

The Court erred in overruling defendants' objections to plaintiffs' proposed findings of fact and conclusions of law.

XXXI.

The Court erred in refusing to grant defendant's proposed amendments to the findings of fact and conclusions of law.

XXXII.

The Court erred in entering judgment ordering all the Soo quartz mining claim to be sold in satisfaction of the judgment rendered in said cause.

XXXIII.

The Court erred in refusing to limit the judgment in said cause to the sale of the westerly three hundred feet of the Soo quartz mining claim to a depth of one hundred feet.

ARGUMENT.

CITATIONS.

Memorandum:—The "General Mechanic's Lien Law," hereinafter referred to, certain sections of which are quoted in full or in part, is also found in Vol. I, Fed. Stat. Ann., pages 282-285, being Chap. 28, Alaska Civil Code; also 31 Stat. L. pp. 534-537.

The "Dump Lien Law" hereinafter referred to but not quoted was an Act of Congress, approved June 25, 1910, Chap. 422; Fed. Stat. Ann. Supp. 1912, pp. 14-17; 36 Stat. L. 848-851.

The sections of the Comp. L. of Alaska relating to liens on personal property hereinafter quoted are part of Chap. 29. of Civil Code for Alaska, Vol. 1, Fed. Stat. Ann. pp. 286-289; 31 Stat. L. 537-541.

Act of the Alaska Legislature.

The "Act of the Alaska Legislature" hereinafter referred to being Chapter 79, Session Laws of Alaska for 1913, is as follows:

AN ACT to create, establish and provide for liens on mines in favor of laborers and materialmen, and repealing all acts and parts of acts in conflict herewith.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. Every person who shall perform labor upon, or furnish material for the working or development of any mine, lode, mining claim or deposit yielding or containing coal, metal or mineral of any kind, or for the working or development of any such mine, lode, mining claim or deposit in search of any coal, metal or mineral; and any person who shall do work upon or furnish materials for any shaft, tunnel, incline, adit, drift or other excavation designated for the use, or working, or draining of any such mine, lode, mining claim or deposit; and any person who aids or assists in the kind of work hereinbefore described by his labor as cook, engineer, fireman, or in cutting or delivering wood used or intended to be used in such work; and any person who shall do work on or furnish material for any road, tramway, trail, flume, ditch or pipe line, building, structure or superstructure, dredge, steam shovel or machinery used for, or in connection with the working or development of any such mine, lode, mining claim, deposit, shaft, tunnel, incline, adit, drift or other excavation; and any person who shall perform labor or service in freighting or packing any material or supplies for the use, working, or development of any such mine, lode, mining claim, deposit, road, tramway, trail, dredge, steam-shovel, machinery, flume, ditch or pipe line, building, structure or superstructure, shall have a lien upon such mine, lode, mining claim, deposit, road, tramway, trail, flume, ditch or pipe line, building, structure, superstructure, dredge, steam shovel or machinery to secure to him the payment for the work or labor done, or material furnished, which lien shall attach in every case to such mine, lode, mining claim, deposit, and the ore, gold bearing earth, rock, gravel, sand, gold, gold dust or other precious metals mined, taken and extracted from

such mine, lode, mining claim, deposit, shaft, tunnel or other excavation, road, tramway, trail, flume, ditch or pipe line, building, structure, superstructure, dredge, steam-shovel or machinery owned or used in connection with the operation and development of the same.

Sec. 2. When two or more mines, lodes, mining claims or deposits are owned or claimed by the same persons and worked through a common shaft, tunnel, incline, adit, drift, or other excavation, or over one tram, or at one mill or other reduction works, then all the mines, lodes, mining claims or deposits so worked, and all roads, tramways, trails, flumes, ditches or pipe lines, buildings, structures, superstructures and all machinery, used or worked in connection therewith, shall, for the purpose of this act, be deemed one mine.

Sec. 3. The provision of this act shall not be deemed to apply to the owner or owners of any mine, lode, mining claim, or deposit, shaft, tunnel, incline, adit, structure, superstructure, dredge, steam shovel or machinery when the same shall be worked by a lessee or lessees or other person or persons other than the owner; provided, the lessor or lessors or other person or persons other than the owner of any such mine, lode, deposit, shaft, tunnel, incline, adit, drift or other excavation, millsite or mill, shall have recorded in the office of the recorder wherein any such mining property is situated, a copy of such lease or any other instrument, before the work shall have begun on such property; Provided further, that the owner or owners of any such mine or mines, lodes, deposits, shaft, tunnel, incline, adit, drift, or other excavation, mill or millsite, before the work shall have begun on such property, shall have posted at not less than three conspicuous places upon such mine, lode, deposit, shaft, tunnel, incline, adit, drift, or other ex-

cavation, mill or millsite, at or near the place thereon where the same is being worked or developed, a notice in writing, signed by the owner or owners of such property, stating the name or names of the lessee or lessees or other person or persons other than the owner operating said property, and that the owner or owners thereof will not be responsible for any debt or debts contracted by the lessee of lessees or other person or persons other than the owner, in connection with the working, operation or development of such property, or for any work, improvement or development thereon under such lease or other instrument. The failure of any owner or owners of such property to post the notices above provided for, shall be deemed conclusive proof of the consent of such owner or owners that his or their interest in such mine shall be subject to any lien filed under the provisions of this act; provided, however, that the person entitled to a lien under the provisions of this act for labor performed shall have a lien on the leasehold interest and on all of the ores and mineral bearing rock, earth, dirt, gold and gold dust and other precious minerals mined, taken and extracted by the lessee.

Sec. 4. The lien provided for in this act is a preferred lien, and is prior to any lien, and no sale, transfer, mortgage or assignment of any mine, mining claim or other property, the subject to the lien under this act, shall divert or defeat the lien thereon, except as hereafter provided, but no lien provided for in this act shall bind any such mine, lode, deposit, shaft, tunnel, incline, adit, or other excavation, or any road, tramway, trail, flume, ditch, pipe line, building, structure, superstructure, dredge, steam-shovel or machinery used for or in connection with the working and development of any such mine, lode, mining claim or deposit for a period longer than six months

after the same shall have been filed, unless suit be brought in a proper court within that time to enforce the same; or if a credit is given, within six months after the expiration of such credit; but no lien shall be continued in force for a longer time than one year from the time work is completed by any agreement to give credit.

Sec. 5. The lien provided for in this act shall not be prior to a mortgage executed in good faith and for a valuable consideration and recorded in the office of the recorder for the precinct in which the property covered by said lien is situated, in accordance with the recording laws now in force in the Territory of Alaska: Provided, however, that the mortgagee shall post or cause to be posted upon the mining premises or property, notices of his said mortgage, in the same manner as notices of non-liability are to be posted under the provisions of this act, which notices shall contain and state the date and amount of the mortgage, the volume and page of the records where recorded, and a description of the property mortgaged, but the priority of such mortgage shall only attach from the time that notice thereof is posted upon the mine or mining premises or property, and then only as to such labor performed or material furnished after the date of such posting and recording. The provisions in this act as to the priority of liens therein mentioned, shall not apply to any leasehold interest, or to the ore, earth, rock, gravel, sand, gold, gold dust or other precious minerals extracted from any mine, lode, mining claim, deposit, shaft, tunnel, incline, adit, drift or other excavation by any lessee or lessees or other person or persons not the owner of such property; and such lien shall be prior to and prefered over any deed, mortgage, attachment or any other lien whatsoever, whether the same was given or made prior to the per-

formance of such labor or not.

Sec. 6. All acts and parts of acts in conflict herewith are hereby repealed to the extent of such conflict.

Approved, April 30, 1913.

Citations from Compiled Laws of Alaska.

Sec. 691. Every mechanic, artisan, machinist, builder, contractor, lumber merchant, laborer, teamster, drayman, and other persons performing labor upon or furnishing material of any kind to be used in the construction, development, alteration, or repair, either in whole or in part, of any building, wharf, bridge, flume, mine, tunnel, fence, machinery, or aqueduct, or any structure or superstructure, shall have a lien upon the same for the work or labor done or material furnished at the instance of the owner of the building or other improvement or his agent; and every contractor, subcontractor, architect, builder, or other person having charge of the construction, alteration, or repair, in whole or in part, of any building or other improvement as aforesaid shall be held to be the agent of the owner for the purposes of this code.

Sec. 692. The land upon which any building or other improvement as aforesaid shall be constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof (to be determined by the judgment of the court at the time of the foreclosure of such lien), and the mine on which the labor was performed or for which the material was furnished shall also be subject to the liens created by this code if, at the time the work was commenced or the materials for the same had been commenced to be furnished, the land belonged to the person

who caused the building or other improvement to be constructed, altered, or repaired; but if such person owned less than a fee-simple estate in such land, then only his interest therein shall be subject to such lien; and in case such interest shall be a leasehold interest, and the holder thereof shall have forfeited his rights thereto, the purchaser of such building or improvement and leasehold term, or so much thereof as remains unexpired at any sale under the provisions of this code, shall be held to be the assignee of such leasehold term, and as such shall be entitled to pay the lessor all arrears of rent or other money and costs due under the lease, unless the lessor shall have regained possession of the land and property, or obtained judgment for the possession thereof, prior to the commencement of the construction, alteration, or repair of the building or other improvement thereof; in which event the purchaser shall have the right only to remove the building or other improvement within thirty days after he shall have purchased the same; and the owner of the land shall receive the rent due him, payable out of the proceeds of the sale, according to the terms of the lease, down to the time of such removal.

Sec. 693. A lien created by this code upon any parcel of land shall be preferred to any lien, mortgage, or other incumbrance which may have attached to the land subsequent to the time when the building or other improvement was commenced, or the materials were commenced to be furnished and placed upon or adjacent to the land; also to any lien, mortgage, or other incumbrance which was unrecorded at the time when the building, structure, or other improvement was commenced, or other materials for the same were commenced to be furnished and placed upon or adjacent to the land; and all liens created by this code upon any building or other improvements shall

be preferred to all prior liens, mortgages, or other incumbrances upon the land upon which the building or other improvement shall have been constructed or situated when altered or repaired; and in enforcing such lien, such building or other improvement may be sold separately from the land, and when so sold the purchaser may remove the same, within a reasonable time thereafter, not to exceed thirty days, upon the payment to the owner of the land of a reasonable rent for its use from the date of its purchase to the time of removal: *Provided*, if such removal be prevented by legal proceedings, the thirty days shall not begin to run until the final determination of such proceedings in the court of first resort or the appellate court if appeal be taken.

Sec. 694. Every building or other improvement mentioned in section six hundred and ninety-one, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein; and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this code, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon the land, or upon the building or other improvement situated thereon.

Sec. 695. It shall be the duty of every original contractor, within sixty days after the completion of his contract, and of every mechanic, artisan, machinist, builder, lumber merchant, laborer, or other person, save the original contractor, claiming the benefit of this code, within thirty days after the completion of the alteration or repair thereof, or after he has

ceased to labor thereon from any cause, or after he has ceased to furnish materials therefor, to file with the recorder of the precinct in which such building or other improvement, or some part thereof, shall be situated, a claim containing a true statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with the lien sufficient for identification, which claim shall be verified by the oath of himself or of some other person having knowledge of the facts.

Sec. 703. The words "building or other improvement," wherever the same are used in this chapter, shall be held to include and apply to any wharf, bridge, ditch, flume, tunnel, fence, machinery, aqueduct to create hydraulic power, or for mining or other purposes, and all other structures and superstructures, whenever the same can be made applicable thereto; and the words "construction, alteration, or repair," whenever the same are used herein, shall be held to include partial construction, and all repairs done in and upon any building or other improvement.

Sec. 705. Any person who shall make, alter, repair, or bestow labor on any article of personal property at the request of the owner or lawful possessor thereof shall have a lien upon such property so made, altered, or repaired, or upon which labor has been bestowed, for his just and reasonable charges for the labor he has performed and the material he has furnished, and such person may hold and retain possession of the same until such just and reasonable charges shall be paid.

Sec. 706. Any person who is a common carrier, or who shall, at the request of the owner or lawful possessor of any personal property, carry, convey, or transport the same from one place to another * * * shall have a lien upon such property for his just and reasonable charges for the labor, care and attention he has bestowed and the food he has furnished, and he may retain possession of such property until such charges be paid.

Sec. 709. Every person performing labor upon, or who shall assist in obtaining or securing saw logs, spars, piles, or other timber shall have a lien upon the same for the work or labor done upon or in obtaining or securing the same, whether such work or labor was done at the instance of the owner of the same or his agent. The cook in a logging camp and any and all others who may assist in or about a logging camp shall be regarded as a person who assists in obtaining or securing the saw logs, spars, piles, or other timber mentioned herein.

Argument of Assignment of Error.

I.

The principal question presented by appellants' assignment of errors is the validity of the act of the Alaska legislature, approved 30 April, 1913, in effect 30 July, 1913, chapter 79, Session Laws, 1913.

The question is presented by assignments of error 4, 8, 11, 12, 15, 16, 18, 19, 20, 22, 25, 27, 28, 32, and 33.

If said act is void, for the reasons set forth hereafter, the other questions are only of secondary importance, but appellants and the bar of Alaska would appreciate rulings on said question, for future guidance in interpreting

and administering the existing laws and acts that the Legislature of Alaska may hereafter enact.

Appellants submit that the Act in question is void for the following reasons, to-wit:

(1) That more than one subject is treated in the Act, contrary to the prohibition of section 8 of the Organic Act of the Territory of Alaska.

(2) That the subject of the Act is not set forth in its title.

(3) That the Act is not complete in itself, nor by any reasonable intendment can it be made so by reference to any valid acts in force in Alaska.

(4) That the Act is retrospective and retroactive, and does not contain any saving clause exempting from its provisions contracts entered into, rights acquired, or interests vested under existing valid laws then in force.

(5) That it is in violation of section 10 of article I of the Constitution of the United States, in that it impairs the obligations of existing contracts.

(6) That it is in violation of the 5th amendment to the Constitution of the United States, in that it confiscates property without due process of law.

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(1) More than one subject is embraced in the Act.

(a) The Act provides for liens on *mines;* also other excavations that might reasonably be included within the meaning of the term.

(b) It provides for liens on roads, tramways, trails, flumes, ditches, pipe-lines, buildings, structures, or super-

structures, all of which may be treated as real estate or appurtenances, by reason of being affixed to the soil, or being part thereof, but which may have no immediate connection with a mine or be in proximity thereto, and which may be on the property of others than the owner of the mine.

(c) It provides for liens on personal property, such as machinery, steam-shovels, dredges, etc.

(d) It provides for liens on gold and gold dust and other products of the mine after they have been segregated therefrom and have become personalty.

(e) It provides for liens in favor of cooks, wood-choppers, teamsters, and others, not heretofore classed as *laborers*.

(f) It provides for subrogating the rights of mortgagees, vendees, assignees, and other encumbrancers, to the liens of laborers and other persons rendering service.

(g) It provides for liens in favor of material-men who furnish material for the various classes of work described in the Act.

(h) It provides for the recording of leases not heretofore required to be recorded.

(i) It provides for the repealing of acts in conflict therewith.

The Organic Act creating the Alaska Legislature, approved by Congress 24 August, 1912, contains the following provision:

"Sec. 8. * * * No law shall embrace more than one subject, which shall be expressed in its title."

(2) The subject of this act is not set forth in the title thereof.

The title is: "*An act to create, establish, and provide for liens on mines, in favor of laborers and material-men, and repealing all acts and parts of acts in conflict therewith.*"

A. Beneficiaries.

It is true the act is comprehensive enough to cover the *creating* and *establishing* of liens on *mines.* "Mines" is probably sufficient to cover the mine itself, the mining claim, lodes, and deposits worked as a mine. The shafts, tunnels, inclines, adits, drifts, and other excavations, are probably included therein as they are the usual means by which mines and mining claims are worked. The words "provide for," as used in the title of the act, we take to be practically synonymous with "create" and "establish," for when a lien is "created" or "established," the method of procedure for vesting the same may be provided for. If "provide for" means the method of crystalizing the lien by filing notice, etc., then that is superfluous, as those provisions are omitted from the act. *Laborers* who work in any of the various excavations by which the values are extracted from the ground are likewise sufficiently described, as well as material-men who furnish supplies for making the various excavations effective for the purposes for which they are intended or safe for the laborers employed therein.

The Courts have held that mechanics' lien laws shall be liberally construed as respects the property to be cov-

ered thereby and as to the enforcement of the lien after it has attached, but they must be *strictly* construed as to the *persons* entitled to a lien and the *things done* to obtain a lien. 2 Sutherland on Stat. Constr., (2 ed., p. 1254,) sec. 690, and cases there cited.

Measured by this standard, the word "laborer" could hardly be held to have a broader meaning than the generally accepted one, as shown by the act itself, for, in addition to the use of the word "laborer," as mentioned in the title, the act, by express terms, extends the benefits of the act to "engineers," "firemen," "cooks," "wood-choppers," "wood-haulers," "freighters," and "packers," and by implication to carpenters and their assistants, pipe-fitters, dredge-masters, winch-men, and other employees, who must possess some skill or ability in their particular lines, none of whom (with the possible exception of wood-cutters) could be classified under the general heading of "laborers," either by general intendment or by their own conception of the dignity of their several callings, or by the clearly expressed intention of the Legislature.

The Act might be construed, and an attempt is now being made to extend its provisions to the employees of an independent contractor, who, for a specified sum per cord, agreed to deliver wood to a mine; this, in spite of the fact that the contractor has been paid in full. To our minds, it appears clear that the title of the Act does not, by the most liberal construction, designate or classify in any comprehensive manner, or by such general terms as might be deemed to include all or a material part, the

beneficiaries described in the text of the Act.

B. Property.

The Act does not designate in its title, all, or a material part, of the *property* to be covered, in addition to the property that could reasonably be construed to be covered by the word "mines." As above set forth, it extends the burden to various other objects that are not real in their nature, and to various interests in real estate, that may not be, and probably are not, connected with the mine itself, and which no reasonable person with any knowledge of the English language would expect to be covered by the word "mine" as used in the title of the Act, and which the Legislature attempts to include as a part of a "mine" by enactment.

Being a Legislature of limited powers, we do not believe that their power extends to repealing the dictionaries or the Courts' judicial interpretation of the meaning of words. The Standard Dictionary defines "mine" as follows: "(1) *An excavation, properly underground, for digging out some useful product, as ore, metal, or coal.* (2) *Any deposit of such material suitable for excavating and working; as, a placer mine.*"

The Act attempts to include as a part of a "mine" other realty, such as *roads, trails, tramways, flumes, ditches, and pipe-lines*, some of which may or may not be realty, and all of which may not be in close, or in any, proximity to the mine; also buildings, structures, and superstructures, which may or may not be on the "mine," and which may be, and many times are, on property belong-

ing to persons other than the owner of the "mine," or on property not covered by the lease It attempts to include property that cannot, by any strained construction, be classed as anything but personalty, to-wit, *dredges, steam-shovels, and machinery*, no mention of which is made in the title of the Act.

The Supreme Court of Idaho, in the case of State vs. Coffin, 74 Pac. 693, syllabus 5, says:

> "The Legislature cannot in the title of an act use language which, in the ordinary and usual acceptation of the terms thereof, would imply and convey one meaning, and in the body of the act declare that such language means the reverse."

On page 967, Id., the Court quotes Mr. Justice Campbell of the Supreme Court of Michigan as follows:

> "The purpose of the statute, so far as it is lawful, must be determined by its title; and it is not competent to use one title and explain in the body of the act that it means something else. The constitutional rule requiring the title to contain the object of the act would be a farce if there was any power in the legislature to give new meaning to language."
>
> "The title of a legislative act must be, in a sense, an index to its subject matter; that it is so closely related that it may be construed so as to bring it within the body of the law, will not be sufficient."
>
> Hearn vs. Louttit, (Ore.), 72 Pac. 132, 133.
>
> Lewis vs. Dunne, (Cal.), 66 Pac. 478.

Nothing can be determined from the act itself as to what particular statutes are repealed.

"Repeals of statutes by implication may not be worked

piecemeal."

State vs. Mitchell, 104 Pac. 792.

To make the act in question effective there must be a repeal by express terms of lien statutes which affected persons other than laborers.

Comp. Laws of Alaska, sec. 691.

Northern Pacific Express Co. vs. Metschan (Ore.), 90 Fed. 80.

The Act is so vague, uncertain and ambiguous as to render it void.

The laws of Alaska, as they now exist, give to persons doing work on personalty of the character therein described, by way of repairs, improvements, etc., a lien thereon for services rendered. (See sec. 705, Comp. Laws of Alaska.) The act of the Legislature gives a lien on the same personalty to a man working on a pipe-line, a ditch, a road, a trail, a flume, etc., being constructed perhaps twenty miles away, or to a person cutting wood for some wood-hauler. In the event of a conflict between the liens, which would be deemed superior?

The general mechanic's lien law in effect in Alaska when the act of the Legislature went into effect, and not expressly repealed, as it is not in conflict with the act under discussion, since it provides for liens of others than miners and on other structures; gives to laborers, carpenters, etc., constructing a building, or any other structure, such as a flume, ore-bunkers, a boiler-house, etc., a lien thereon and on the ground upon which such structure stands, as security for their wages. (Id., sec.

691.) The act of the Legislature gives to the man underground or the teamster hauling wood to the mine a lien thereon also. In the event of a conflict of liens, how shall their priority be determined?

Section 1 of the Act in question gives a lien to all of the beneficiaries named therein on, among other things, all of the mineral products extracted from the ground. The latter part of section 3 of the Act limits the lien on the mineral products to those performing *labor* when the ground is worked by a *lessee*. The latter part of section 5 of the Act then provides in substance that the lien of *all* of the claimants under the act upon the mineral products shall be superior to all other liens or claims. Which section shall prevail? Who can ascertain from reading the Act which of the beneficiaries named therein would have a lien on the mineral products if the ground is worked by a lessee?

The list of conflicts and inconsistencies might be extended indefinitely, and the foregoing are given merely as illustrative of the hopeless confusion that has arisen by reason of the ambiguous language used and the indefiniteness and uncertainty of the act in question; an ambiguity and uncertainty that, to our minds, renders it entirely void.

The Act also attempts to cover the mineral products extracted from the earth, without mentioning them in the title.

C. Contractual Rights.

It attempts to regulate the acts and alter the rights

and remedies of vendees, mortgagees, etc., without mentioning them in the title, and to make their vested contractual rights subordinate to liens acquired subsequent to the vesting of those rights.

No mention is made in the title in regard to the changes proposed in the recording laws as then in force in Alaska, although the Act requires the recording of leases, which theretofore were not necessarily required to be recorded, and nothing in the title of the Act would put any person on his guard in that respect.

We are well aware of the various decisions of the Courts which declare that, if a void part of an act can be separated from the valid part, and the valid part presents anything like a symmetrical whole, capable of being intelligently interpreted and enforced, then the valid part would be upheld. Sutherland on Stat. Constr., (2 ed., p. 581), sec. 299.

Cooley's Constitutional Limitations, (7th ed.), p. 312, expresses the rule as permitting the upholding of the valid portion of the law if, after eliminating the void part, it would *"leave a complete and sensible enactment which is capable of being executed."* But, after diligent effort, we are unable to segregate from the mass of inconsistent, contradictory, and vague provisions, any appreciable part on any one subject that could be fairly declared to be an intelligible, complete, concrete expression of the legislative will, and there are no means provided for "executing" the act.

Consistent with the rule above stated and equally important and particularly applicable to the case at bar

is the other rule laid down in Sutherland, Stat. Constr., sec 297, Vol. 1, pages 579-580:

"It may be laid down generally as a sound proposition that one part of a statute can not be declared void and leave any other part in force, unless the statute is so composite, consisting of such separable parts, that, when the void part is eliminated, another living, tangible part remains, capable, by its own terms, of being carried into effect consistently with the intent of the legislature which enacted it, in connection with the void part." "If the legislative purpose as expressed in the valid portions of the act can be accomplished independently of the unconstitutional portion *and considering the entire act, it can not be said that the legislature would not have passed the valid portion had it been known that the invalid portion must fail*, effect will be given to so much as is good." (Citing English vs. State, 31 Fla., 340, 12 So. 689).

"On the other hand, *if it is obvious that the legislature did not intend that any part should have effect, unless the whole, including the part held void, should operate, then holding a part void invalidates the entire statute.*" "If all the provisions of an act are so interwoven as to be incapable of distinct separation, *or are of such a character that it can not be said that the legislature intended that the valid part should be enforced if the other parts fair, the entire law will be held to be invalid.*" (Citing 35 Atl., 787; 37 Atl., 949). "If the obnoxious section or part is of such import that the other sections or parts without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative." (Citing Connolly vs. Union Sewer Pipe Co., 134 U. S.,

540-565, 22 S. C. R., 431, 46 L. Ed., 679.)

Applying the foregoing rule to the case at bar, the situation is this:

(a) Before the passage of the Act in question, sections 691-692 of the Compiled Laws of Alaska, hereinbefore quoted, were in force in Alaska, giving mechanics, artisans, machinists, builders, contractors, lumber merchants, laborers, teamsters, draymen, and "other persons" (which has been held to include miners) a lien on the mine itself or a "structure" thereon (as defined in sec. 703, Supra) for their wages for services rendered, and for the value of supplies furnished, always presuming that non-liability notices have not been posted.

(b) The dump lien law (Compiled Laws of Alaska, sec. 164, 36 Stat. L. p. 848) gave miners, laborers, cooks, engineers, firemen, woodcutters, and wood-haulers a lien on the "winter dump," or any dump of mineral-bearing earth and gravel produced in whole or in part by their labor, as well as on *all* the mineral products when cleaned up and separated from the gravel and earth, and *gave their liens precedence over all mortgages, attachments, and other encumbrances.*

(c) Persons performing labor upon, or who should make, alter, or repair any machinery, had their lien thereon, with the right to hold possession thereof as security therefor. (Compiled Laws of Alaska, sec. 705.)

(d) Freighters who transport any personal property, such as wood, at the request of the owners, had a lien thereon for their charges. (Id., Sec. 706.)

(e) Persons (woodcutters) securing saw-logs, spars,

piles, or *other timber* had a lien thereon for services rendered. (Id., sec. 709.)

(f) Liens provided for under the general mechanic's lien law were superior to *prior* executed mortgages, attachments, and other incumbrances, *not recorded* when the labor was *commenced* and to all subsequently acquired liens (id., sec. 693), the act containing a saving clause to protect existing contracts at the time of its passage. (Id., sec. 704).

(g) Liens provided for under the "dump lien law" were superior to *all* encumbrances on the dump and its mineral products, with a saving clause to protect existing rights. (See citations above.)

Bearing in mind the foregoing existing lien laws, it is obvious that the intent of the legislature was to change such laws, and the changes they desired to make are best ascertained by considering the new law passed by them now under discussion, and therefrom we find the following proposed changes:

(1) An increase in the scope of the Act as to the *property* covered; to-wit: (a) *realty* such as trails, ditches, pipe-lines, roads, flumes, tramways, structures, etc, not necessarily on the *mine* being worked and (b) *personal property*, such as dredges, steam-shovels, mills, reduction works, and any machinery used in connection with the industry, part or all of which might not be on any part of the mine proper.

(2) An increase in the number and character of the *beneficiaries* who were to have a lien on the mine; to-wit: (a) woodcutters, teamsters, packers, dredge-masters,

and a number of others, who had therefore had a right to specific liens on the particular article upon which they performed their labor; and (b) persons working on ditches, pipe-lines, roads, trails, tramways, in mills, etc., who formerly had no lien on the mine itself.

(3) It required the recordation of leases.

(4) It required changes in the notices of non-liability.

(5) It subrogated existing contracts to the rights of lien-claimants.

(6) It attempted to extend to the mineral extracted from quartz-claims the provisions theretofore applicable to placer-claims only, as provided in the "dump lien law" above referred to.

(7) It extended the right to acquire a lien for labor performed in carrying on actual *mining* operations, whereby the very essence and substance of the mine is taken away, as distinguished from *prospecting and development* work.

As heretofore demonstrated, the Act, to our minds, is void, so far as the first six changes above enumerated are concerned; either because of the defective title, or because the Act embraces more than one subject; or because of it being in violation of section 10 of article I of the Constitution of the United States, or in violation of the Fifth amendment to the Constitution, or because of being retroactive and retrospective in its action, as hereinafter discussed.

If our conclusions are correct and if the seventh proposed change above set forth is valid, then the non-liability notices posted by the appellants in this case

would protect their interests in the ground; and furthermore, it is obvious that the act would not have been passed for that purpose alone. The dump lien law, heretofore referred to, already covers the subject to a limited extent.

Reasoning from the foregoing and applying the rule laid down in section 301 of Sutherland on Statutory Construction, "*Where all the provisions of an act are connected as parts of a single scheme, the incidental or dependent provisions must fall with the failure of the main purpose.*" no other conclusion could be reached than that the enactment into law of the *void* portion of the statute in question was the *moving*, if not the *sole* reason, for its enactment, and had it not been desired to enact the *void* portions, *no* law would have been passed. The valid portions, if any there be, obviously would not have been enacted alone, as the subject was already treated and covered by existing laws. Sutherland on Statutory Construction, 2 ed., secs. 301, 302, 303, 305, 307, and cases there cited.

> "Where one portion of an act has been declared unconstitutional or void, the presumptions are generally against the balance being allowed to stand as an independent act." Skagit County vs. Stiles, (Wash.) ,39 Pac., 116; Sutherland on Stat. Constr., 2 ed., vol. 1, p. 583, sec. 297.

Did it purport to be an amendatory act, some of its provisions might be more readily interpreted and some of its glaring inconsistencies might be glossed over, as other provisions of the amended act, not repealed, might be referred to to suggest the general thought of the legis-

lature. But even this staff is not provided, and, after carefully studying the act, the only concrete impression left on the reader's mind, from which he would be enabled to visualize the collective thought of the legislature, would be that they were endeavoring to crystalize into law the sentiment that neither the Constitution, the laws of the United States, nor the Organic Act were ever intended to apply to labor legislation.

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3. The Act is an independent Act and as such is incomplete and fails to provide any procedure for vesting the lien or foreclosing it.

The Act purports to be an independent act, and does not derive virility from any other act now in existence, and every provision in conflict therewith is expressly repealed. For its wording it borrows some, but not all, of the provisions of the general mechanic's lien law in force in Alaska when this Act was enacted. (Comp. Laws of Alaska, sec. 694). By its general provisions it attempts, ineffectually, however (104 Pac., 792, supra), to repeal a part of said Act, but does not borrow any of the provisions for vesting the lien or enforcing the same. The generator is there without the power to make it go, or any means for conducting the energy after it is created. If we borrow the power to bring the lien into force, to-wit: the provisions of the old law about the time and manner of creating a lien by filing notice of lien, etc.—[the provisions of which are not applicable to the whole of this Act, two separate methods being provided, one under the general lien law and another under the "dump

lien law," essentially differing from each other],—even then the machine is not complete, and to utilize the energy so created we must borrow again from the general equitable powers of the courts of equity the general principles relative to the foreclosure of liens, all of which must be added to this Act presumed to be complete in itself.

The latter part of Sec. 1 of the Act declares a lien shall attach to all the gold, gold dust, and other precious minerals, etc. Gold or gold dust sold in good faith, in the due course of business, for full value, to a banker or merchant, or used as a medium of exchange, or delivered to a United States postoffice, or to an express company for transportation, is apparently still subject to the lien. There are no means indicated for impressing it with the lien and no time limit within which the lien could be filed. It might readily be argued that, if the purchaser commingled it with other gold dust, not likewise tainted with the lien, the whole mass would be subject to a lien wherever it was found and that for an indefinite time: the manner of acquiring and enforcing the lien being by the legislature cheerfully shifted to the shoulders of the Courts, attorneys, and litigants.

The trial Court recognized the Act as being a separate, independent act, by refusing to allow attorneys' fees or costs of preparing and filing the liens, as provided by the general mechanic's lien law of Alaska. The Act itself has no provisions in regard to filing liens, but the Court held that it was necessary to file a lien in order to burden the land with the lien, and the only possible means of up

holding them in any way was to borrow from the general mechanic's lien law the provisions relative to the filing of liens. Objections to the introduction of the liens in evidence were overruled; defendants' motion to strike the liens as exhibits from the files was denied (Ass. of Error II). All the rulings of the Court indicated his conviction that to uphold the Act in any particular he considered it absolutely necessary to borrow the provisions of the general mechanic's lien law so far as they related to filing of liens. If this was permissible, to have been consistent he should have borrowed the other provisions relative to attorneys' fees and costs and allowed them as part of the judgment. The rulings are inconsistent and one of them *must* be erroneous.

He frankly stated that he didn't know what the law meant, and attorneys for appellant cheerfully acknowledge a similar state of mind.

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4 and 5. The act impairs the obligations of existing contracts and is in violation of section 10 of article I of the Constitution of the United States and is retrospective and retroactive.

Prior to the time the act in question went into effect, a mortgage on a mining claim and its output, properly executed and recorded, if made in good faith for a valid consideration, was absolutely good as against all the world, even against a mechanic's lien, if recorded prior to work being commenced by the lien-claimants on the property so encumbered (Comp. Laws of Alaska, sec. 693), save and except in regard to valuable minerals in

dumps of gold-bearing gravel, taken out of a *placer* mine and remaining unwashed when the lien was filed. (Id., secs. 162-174. Act of Congress, 25 June, 1910, 36 Stat. L. 848-851.)

The last named act, however, provides: *"This preference* (priority over mortgages, deeds, bills of sale, etc.) *shall not apply to any such deed, mortgage, bill of sale, attachment, conveyance, or other claim given in good faith and for value prior to the approval of this act."*

After 30 July, 1913, all such existing mortgages, deeds, bills of sale, conveyances, etc., whether held by residents or non-residents, were void as against a laborer's claim, regardless of whether the laborer had actual notice thereof or constructive notice by reason of their recordation as provided by law, unless the *mortgagee* posted notice on the claim covered by the mortgage, containing the "date and amount of the mortgage, the volume and page where recorded, and a description of the property mortgaged," etc. (Act, sec. 5).

If a mortgagee did not know that work was being performed on the claim and had no opportunity to protect his mortgage interest, an operator, by defaulting in his payments, could cause liens to be filed, and his contract of mortgage would become null and void. If he learned that work was being done on the ground several months after it had actually commenced and he then hastened to post his notices; yet all labor done before such posting had priority over his mortgage.

The general mechanic's lien law in force in Alaska prior to 30 July, 1913, and probably now in effect, provides that

the owner of a claim has three days after he *learns that work is being performed* on the claim, to protect himself by posting non-liability notices. (Comp. Laws of Alaska, sec. 694), and the interest of a mortgagee is amply protected by having his mortgage recorded before the work commences. (Id. 694).

As a further proof of the inconsistency and incongruity of the Act, we desire to call the Court's attention to the fact that paragraph 4 of said Act gives the lien of the persons named therein as beneficiaries priority over all mortgages on the "mine, mining claim, or other property." The first portion of section 5 of the Act permits the holder of the mortgage to protect his interest by posting notices, etc., but the latter portion of section 5 enables the lien claimant to reach forth and take away the substance, while leaving the mortgagee the shadow, for it provides:

> "The provisions in this act as to the priority of liens herein mentioned shall not apply to any leasehold interest *or* to the ore, earth, gravel, sand, gold, gold dust, or other precious minerals, extracted from any mine, lode, mining claim, deposit, shaft, tunnel, incline, adit, drift, or other excavation, by any lessee or lessees or other person or persons not the owner of such property; and such lien shall be prior to and preferred over any deed, mortgage, attachment, or any lien whatsoever, whether the same was given or made prior to the performance of such labor or not.

It is not provided that the *lessees' share or percentage* shall be taken, but *all* the valuable minerals, metals, etc., whether mortgaged or assigned or not, regardless of

the compliance or non-compliance by the owner of the mortgage with the provisions of the act relative to the posting of non-liability notices. For fear they had overlooked something, the legislature, impliedly at least, invests the gravel, sand, rock, and earth with the attributes of "valuable mineral", and gives them to the lien claimant also.

The law is evidently conceived in ignorance of existing law and embodied in the laws of Alaska without any attempt to harmonize it with other provisions of the Code, or in recognition of any principle of equity or fair-dealing. It unblushingly ignores existing contractual rights, and contains no saving clause to protect those who had, in good faith, entered into contracts with others, when their contractual rights are fixed by existing laws. Owners of property pledging or encumbering the same in satisfaction of their obligations are deprived of the means to pay their indebtedness. The rights of mortgagees or assignees who have advanced money on mining property and as security have taken liens upon or assignments from the owners or lessors of their portion of the output, are deprived of their security. The seventh son of a seventh son, gifted with the power of prophecy, never would have anticipated such action on the part of the legislature, and the mine-owners, merchants, and bankers of Alaska, who believed their contracts, solemnly entered into, whereby their rights would be recognized and protected under the provisions of the then existing laws, now find, to their sorrow, that every principle of law that stands in the way of the laborer

must be made subservient to the whims of the legislature.

The Act of the Alaska Legislature imposed additional duties on the Lessor and divested it of rights already vested.

The lease to Spalding and his associates was executed when they first went to work upon the ground about 13 May 1912 (Trans. P. 251). Congress, which then legislated for the Territory of Alaska, had imposed but one condition upon the owner of the ground to preserve his property from liens, and had in effect contracted with such owner that, if he would post upon the ground a notice, in a public place, disclaiming any responsibility (Com. L. of A. sec. 694), his ground should not thereafter become liable for any indebtedness contracted by the lessee. Lessors doubtless had this in mind at the time said lease was executed, and relied thereon. and took the necessary steps to protect themselves from lessee's liabilities.

It has been repeatedly held that an act is in impairment of a contract when it deprives one of the beneficiaries under the contract of a right that he then had, or if it renders the enforcement of his right more burdensome, or takes away from him any benefit, however minute, that might have accrued to him under his contract as it stood at the time of its execution.

> "Any deviation from the terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed therein, or

dispensing with those which are, however minute or apparently immaterial in their effect upon the parties, impairs its obligation." Sutherland Stat. Con. sec. 663, citing

Green vs. Bibble, 8 Wheat. 85, 5 L. Ed. 547.

Planters Bank vs. Sharp, 6 How. 301-329, 12 L. Ed. 447.

"Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution against impairment. If legislation 'tends to postpone or retard the enforcement of the contract the obligation of the latter is to that extent weakened.' " Id., sec. 665.

"Since the prohibition as to the impairment of the obligation of contracts is absolute, the amount and extent of the impairment is immaterial."

6 Ruling Case Law, sec. 319.

Farrington vs. Tennessee, 95 U. S. 679, 24 L. Ed. 558.

"Any act, therefore, which changes the expressed intention of the parties to a contract, *or such as results from their stipulations*, is held to impair its validity, and it is immaterial as to the degree or nature of the change, whether it relates to its validity, construction, duration, discharge, or the evidence of the contract; in all cases the conclusion is the same." (Italics ours.)

6 R. C. L., sec. 319, and cases there cited.

The general principle is aptly stated in 6 R. C. L., sec. 334, as follows:

"The general principle is that the legislature has power to take away by statute that which has been given by statute, except when to do so would obviously amount to the impairment of a vested right."

The owners of the ground had a vested right to keep their ground free from liens by strictly complying with the law as it existed at the time said contract was made, and in the original lease, the terms of which were in force by oral extension during the time plaintiff and his assignors were working on the ground, lessee has contracted to keep posted three notices good under the then existing law. (Par. 10 of Lease, Trans. p. 242.)

"The repeal of a law which constitutes a contract is an impairment of its obligation."

6 R. C. L., sec. 318, citing

Carondelet Canal etc. Co. vs. Louisiana, 233 U. S. 362, 34 S. Ct. 627.

In treating the tests of impairment of contract, in 6 R. C. L., sec. 318, it is said:

"The obligation of a contract is impaired by a statute which *alters its terms by imposing new conditions*, or dispensing with conditions, or which *adds new duties*, or releases or lessens any part of the contract obligation, or *substantially defeats its end. It* may also be stated that a constitutional provision is considered as rendering void any statute which is retrospective and which destroys a vested right of action arising ex contractu." See ruling cases there cited.

Conforming to an existing law is a contract and that law entered into the contract and became a part thereof at the time same was made.

"Conformable to the well established rule that the laws which subsist at the time and place of making the contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms, the obligation of a contract is measured by the standard of the laws in force at the time it was entered into, and its performance is to be regulated by the terms and rules which they prescribe."

6 R. C. L. sec. 314, citing

2 How. 608, [11 U. S. (L. Ed.) 397.]

139 Fed. 111, [71 C. C. A. 199, 1 L. R. A. (N. S.) 1171.]

11 So. 97, [16 L. R. A. 308, 30 A. S. R. 95.]

17 Atl. 405, [4 L. R. A. 348, 10 A. S. R. 266.]

106 N. W. 566, [4 L. R. A. (N. S.) 1074, 125 A. S. R. 574, 91 Am. Dec. 262.]

2 How. 608. [11 U. S. (L. Ed.) 397.]

1 S. E. 80, [98 Am. Dec. 397, 7 Am. Rep. 23.]

19 Wash. 207, [53 Pac. 53, 4 L. R. A. 815.]

"There can be no other standard by which to ascertain the extent of the obligation than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the existing law defines the duty and the right, compels one party to perform the thing contracted for and gives the other a right to enforce the performance by the remedies then in force.

"The law which thus establishes the obligation of a contract is not general or universal law, but the law of the jurisdiction in reference to which the contract is made." (6 R. C. L. 314, and cases cited.)

Measured by the standard above set forth, which is

supported by a number of excellent authorities, the right to keep its ground free from liens by posting not *three,* but *one,* notice upon the ground *was a part of the contract entered into by the Reliance Mining Company upon the date the lease was made, and any attempt on the part of the legislature of the Territory of Alaska to abridge that right was an impairment of an existing contract, and as such was void.*

We recognize the fact that Congress is not bound by the provisions of subdivision 10 of article 1 of the Constitution of the United States, which prohibits *States* from passing any act that impairs the validity of contracts, etc., (Evans-Snider-Buel Co. vs. McFadden, 105 Fed. 293,) and we believe that the legislature of the Territory of Alaska overlooked that fact in preparing the act in question. It was doubtless modeled, to a certain extent, after other acts passed by Congress for Alaska, but much broader in its scope and more stringent in its provisions, and without any saving clause exempting existing contracts from the operation thereof.

We believe the same difficulty arose in regard to the *title* of the act, as the various acts passed by Congress in regard to mechanic's liens had brief titles, although more comprehensive than the title to the act in question. Congress is not restricted to treating but one *subject* in an act, nor is the subject or subjects treated therein required to be set forth in its *title,* and, as the mechanic's lien laws passed by Congress for Alaska dealt with more than one subject, which were not expressed in their titles, the Alaska legislature doubtless followed in part the

same form, (as the lien laws for Alaska passed by Congress had been upheld,) overlooking the prohibition contained in section 8 of the Organic Act, which provides "No law shall embrace more than one subject, which shall be expressed in its title."

The prohibitions of sec. 10 art. I of the Constitution of the United States apply to Territories as well as States.

That the prohibitions against *States* passing laws in impairment of a contract means also to include Territories, see National Bank of Commerce vs. Jones, 18 Okl. 555, 11 A. & E. Annot. Cases, p. 1041, particularly p. 1043, where it says:

> "The Constitution of the United States, which is the supreme and paramount law of the land, and controlling upon all bodies either legislative or judicial, and within the *Territories*, in article 1, section 10, provides: 'No State shall pass any law impairing the obligation of contracts,' and by the provisions of the Organic Act this provision of the Constitution, as well as all other not locally inapplicabble, is to be in force in this Territory. (See Organic Act, sec. 28). An act of the legislature which seeks to impair the obligations of a contract, or to impair or destroy vested property rights, is unconstitutional and void."

This decision was rendered by the Oklahoma Supreme Court the same year Oklahoma was admitted to statehood, but the right of action accrued prior to its admission to statehood and the opinion dealt with an act of the *territorial* legislature of Oklahoma.

Section 3 of the *Alaska* Organic Act passed by Congress and approved 24 August 1912 provides in part as follows:

> "The Constitution of the United States and all the laws thereof which are not locally inapplicable shall have the same force and effect within the said Territory as elsewhere in the United States."

We deem the foregoing proposition self-evident, but cite authority thereon for the reason that the Courts have held, on questions of diverse citizenship that the word "States" as used in the Constitution does not mean "Territories."

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6. The act is in violation of the 5th amendment to the Constitution of the United States.

The act provides for liens on roads, tramways, trails, pipe-lines, flumes, ditches, structures, or superstructures, etc., which may not be, and as a matter of common knowledge seldom are, constructed wholly upon the mine for the working of which they are intended, and which always may be, and frequently are, on the property of others than the owners of the mine or mining claim where the work is being carried on. Yet the lien is extended to each of said interests in realty, and the owners of the ground over which they pass have no means of preventing their interests in said property from being taken under such liens, unless they are likewise the *owners* of the road, pipe-line, etc.; for section 3 of said act says that the provisions of the act shall not apply to the owners of the mine, the road, etc., when the same

shall be *worked* by the lessees, etc., provided the owner of "*any such mine, lode, shaft, tunnel, incline, adit, drift, or other excavation, mill-site, or mill*, shall have recorded in the office of the recorder wherein such mining property is situate, a copy of such lease or any other instrument before the work shall have begun on such property; provided, further, that the owner or owners of any such *mine or mines, lodes, deposits, shaft, tunnel, incline, adit, drift, or other excavation, mill or mill-site*, before the work shall have begun on *such* property, shall have posted," etc.

The owner of the property, over which a ditch, flume, pipe-line, trail, road, or tramway is constructed, or upon which the structure or superstructure is erected, *if not the owner of the mine*, has no escape from losing his ground should a lien be filed thereon, for *he* is not granted any privilege of escaping liability by posting notices, as that is confined to the owner of the *mine, drift*, etc.

The persons constructing the ditch, pipe-line, etc., may be trespassers on his ground, and he have no knowledge of the work being done; the ditch may be constructed by the staker of a water-right, who, under the law, would be entitled to dig the ditch and install the pipe-line if he did not interfere with the rights of the owner of the ground; the right may be acquired by condemnation, or in a number of other ways, none of which arises out of a lease. It might be that an existing road, flume, ditch, or trail was being improved, with or without the knowledge or consent of the owner upon whose ground the same was located; it might be work being done by

one of the joint owners of a ditch or pipe-line on the ground of one of the owners of the ditch, many miles from the claim being worked; in which event, the person doing the work on the ditch or other work would not be a trespasser; yet the lien takes it, without the owner of the soil being able to protect himself in any way. He has not any lease to record and his non-liability notices would be non-effective. He may have granted oral permission to dig a ditch or construct a pipe-line, but even if the permission was in writing, if he is not the *owner* of the *mine* he can not post his notices and have them effective. He has no remedy at law, no "day in court," and his property is taken without "due process of law."

The Act is so ambiguous and uncertain as to be unintelligible.

The wording of the Act is vague and uncertain, to use the most charitabe of terms. It is weird and fantastic in its conception of extracting "ore, gold-bearing rock, gravel, sand, gold dust, or other precious minerals" from "such . . . road, tramway, trail, flume, ditch, pipeline, building, structure, superstructure, dredge, steam-shovel or machinery." We, of course, would not want to say that it could *not* be done, but we do say that we have never *known* it to be done.

We presume that the expression in paragraph 3 of the Act relative to the recording of the lease in the "office of the *recorder* wherein any such *mining property* is situated" may be attributed to "legislative license" to

use words to express what they do not mean. We had always been under the impression that mining claims were out in the hills, and until after the first Alaska legislature passed the act in question, would never have attempted to stake a claim in a recorder's office.

Such looseness of expression renders it extremely difficult to interpret the Act, and we are required to "guess" at its meaning rather than to acquire the information from the perusal of th Act. Again, in the same section (sec. 3), the legislature declares that "the failure of any owner or owners of *such* property (the mine, excavation, etc.) to post the notices above provided for shall be deemed conclusive proof of the consent of such owner or owners that his or their interest *in such mine* shall be subject to any lien *filed under the provisions of this act*," etc.

Section 2 of the Act provides that "when two or more mines, lodes, mining claims, or deposits *are owned or claimed by the same persons* and worked through a common shaft, tunnel, incline, adit, drift, or other excavation, *or* over one tramway, *or* at one mill or reduction works, then all the mines, lodes, mining claims, or deposits *so* worked, and all roads, tramways, trails flumes, ditches, or pipelines, buildings, structures, superstructures, and all machinery used or worked in connection therewith, shall, for the purposes of this Act, be deemed one mine."

Must there be conjunctive ownership of the mines *and* workings through a common shaft, etc., before the lien becomes effective? Is it brought into effect if there is

separate ownership of two or more mines worked through a common shaft, or through several shafts if worked over a comman tramway? Does the law apply to separate operators of the same ground or on separate claims, provided they use the same tramway or same mill or reduction works? In such a case as last mentioned, if one operator defaulted in his labor claims would his neighbor's claim be taken under lien for the debts of the defaulting operator, because they used the same tramway or mill or reduction works? Would the owner of a custom mill, doing work for several owners or lessees, lose his mill under the lien if *one* of his customers defaulted? We do not know, and we can not tell from the Act.

Referring again to the latter part of sec. 3 above quoted. What *owner* does it refer to and what *mine* is subject to lien?

The legislature attempted, in section 2 of the Act, to broaden the scope of the meaning of the word "mine" to include trails, roads, pipe-lines, flumes, tramways, ditches, buildings, structures superstructures, and machinery, (dredges, steam-shovels, etc., not specifically named but obviously intended to be included), and thus subjects itself to the charge that they attempted to practice what is so expressly condemned by the Supreme Court of Idaho in State vs. Coffin, 74 Pac., 693, Supra.

The Act does not provide for the filing of a lien; therefore, how could any property be subject to "any lien filed under the provisions of this law?"

Section 4 says that none of the property subject to

the lien shall be bound thereby for a longer period than six months *after the lien shall have been filed, unless suit be brought, etc.* Within what time must the lien be filed? What shall it contain? How shall personalty subject thereto be invested with the lien? How shall the gold dust be burdened with the lien? What of innocent purchasers before the lien is filed? What of an attaching creditor after work ceases, while the right of lien is in a state of suspension? What title, if any, is required by the owner of the ground who cleans up the gold dust in the boxes or on the plates in the mill before the inchoate right of the lien-holder has become vested by affirmative act on his part? What law, if any, now on the statute books, would apply to the vesting of a lien on the vast number of subjects and articles enumerated in the new law and not covered by either of the old laws on our statute books, when the present act does not furnish the procedure and there are no precedents in the general equity practice to govern such radical provisions?

We have a general mechanic's lien law extending to the ground, the structures thereon, and the leasehold interest, except where notices are posted, such as were posted in the present case, exempting the land from its operation. And we have the "dump" lien law, where the lien and the rights of the parties are clearly defined. But we have nothing to guide us in the present instance but speculation, and no object upon which to work but the chaotic jumble of inconsistent phrases and clauses, inconsistent in themselves and subversive of the hereto-

fore well-established principles of law and opposed to all principles of equity.

II.

Should the act of the Alaska legislature (chap. 79 Session Laws 1913) be held valid, plaintiff's action would fail, as non-liability notices, sufficient in substance and proper in form, had been duly posted by lessors of the ground involved in this action, before the lien claimants commenced work.

This question is presented by Assignments of Error Nos. 19, 20 and 27.

Under the provisions of sec. 694 of the Compiled Laws of Alaska, in force at the time of the passage of chap. 79 of the Session Laws, Alaska Legislature, for 1913, above referred to, effective 30 July, 1913, the owner of mining property upon which work was being done could avoid all liability and defeat any lien thereon by posting a notice in a conspicuous place on the ground, disclaiming responsibility for any indebtedness contracted by lessees or other persons working thereon, and said notice did not require any statement relative to the name of the lessees, etc., nor was the owner required to record the lease.

On 25 January, 1913, while lessee Spalding was working on the ground, the Reliance Mining Company caused *three* such notices to be posted (Findings of Fact, iii., Tr., pp. 282-3). These notices remained posted in conspicuous places during all the time that the plaintiff and his assignors were working on the ground, and were seen and

read by all the witnesses who testified at the trial.

Plaintiff Martin commenced work on 28 July, 1913; his assignor Peterson on 22 July, 1913; his assignor Myers 29 July, 1913; his assignor Mrs. Deck 14 July, 1913; and his assignor Ahlmark 12 July, 1913. Under the lease, as it stood when they went to work, they were charged with notice that the owners of the claim upon which they worked would not be responsible for their wages, neither was the land subject to a lien therefor, and they must look to their employers for compensation. They were not even employed by the Reliance Mining Company, but they affirmatively allege that they were employed by Spalding and Brumbaugh, who were prosecuting the work as "lessees" upon the claim in question. (See paragraph 3 of each separate cause of action.) The trial Court recognized the fact that the property of the Reliance Mining Company would not be held liable for any work performed before 30 July, 1913, as it disallowed the wages of Martin, Peterson, Myers, Mrs. Deck and Ahlmark earned *prior* to 30 July, 1913. If the workmen had actual or constructive notice prior to 30 July, 1913, that the claim was not responsible for their wages, the questions naturally present themselves: By what peculiar system of reasoning could they be said to have lost that knowledge over-night? Was their knowledge of facts in any way different on 30 July, 1913, from what it was on 29 July, 1913? Does the Alaska legislature, with its limited powers, possess the power, unknown or heretofore unsuspected, to, at will, afflict the citizens of Alaska with amnesia?

Plaintiff's assignor Curry was on the claim in April of 1913, and he saw the notices and knew that the Reliance Mining Company disclaimed responsibiblity on its own part and on behalf of its property for debts contracted by the lessees. (Tr., pp. 264-265.)

During all the time that plaintiff and his assignors were employed on the ground the notices remained posted in conspicuous places; one on the gallows-frame at the collar of the shaft, where the men could and must see it every time they went down the shaft or came up from their work; one on the mess-house, where they had their meals served; and one on the bunk-house, where they slept. There was no attempt on the part of the plaintiff and his assignors to prove by any of the witnesses that they did not know of the existence of the notices or had not seen them, but on the contrary all the witnesses testifying at the trial admitted having seen the notices and having read them, and when they finally quit work we find the plaintiff (Tr., p. 247), apparently as a representative of all, and also his assignor Curry (Tr., p 264), each bringing one of the notices to town, presumably to see if there was any chance to base an action upon any defect in the notice. Their actions indicate full knowledge of the existence of the notices, rather than any lack of such knowledge.

In a recent case decided by the District Court of Appeals for the Third District of California, Street vs. Hazzard et al., 149 Pac., 770, advance sheets, 26 July, 1914, the Court says, in syllabus 1:

"The presumption created by the Code of Civil Pro-

cedure, sec. 1183, providing that every person in charge of any mine shall be held to be the agent of the owner, is rebuttable, and one working in a mine with knowledge that the owner will not be liable for his compensation is not entitled to a lien on the property, on any theory of agency."

That case presents many features analogous to those of the case at bar, for the legislature of California changed the law regarding non-liability notices before the claimants in said action went to work. Prior to such change in the law, the owner of the property had posted notices of non-liability, sufficient under the then existing law in California, and these notices were seen by the claimants and they had knowledge that the owner of the property would not be responsible, nor would said property itself be liable for any debts contracted by the persons in possession thereof, who were not the owners thereof. The amendment required a verified copy of the notice of non-liability to be recorded in a specified office, etc. After this law went into effect, the owner of the property failed to record a verified copy of the notice. Hence the suit. It is apparent that both lien-claimants were employed long after the amendment went into effect in California. In discussing the matter, the Court, on p. 772, in considering the effect of the failure to comply with the law requiring the recording of a verified copy of the notice of non-liability, says:

"The filing could have been of no possible advantage to the respondents, since its purpose was entirely accomplished by the actual knowledge that they had of

the facts ,as set forth in said stipulation. The recording of the notice is undoubtedly to convey to the persons performing the work knowledge of the non-liability of the owner. *In the present instance, therefore, it would have added nothing to what was known and recognized without it.*" (Italics ours.)

In the case at bar, the plaintiff and his assignors knew that Spalding was lessee of the ground; knew that notices had been posted, whereby the Reliance Mining Company disclaimed any responsibility for any indebtedness contracted by said Spalding. Had the lease been recorded and the notices given the lessees' names, *what further information could they have received relative to the non-liability of the owner of the Soo Claim?* They knew Spalding was only a lessee of the ground, and they so allege in the liens and complaint. The lessee was receiving 100 per cent of the output, and this fact must have been known to the claimants, for, on 9 October, they formed a partnership with the lessee, whereby it was agreed that they, the laborers, and other workmen, should receive *all* the gold taken out while they were so employed. (Tr., pp. 282-283.) We believe that the circumstances of the case at bar bring it squarely within the reasoning of the Court in the case of Street vs. Hazzard, above cited. During the time they were working, Spalding had no written lease, but was working under a verbal extension of a prior expired lease, and the law provides no means of recording a verbal lease.

The Reliance Mining Company, having once posted their notices of non-liability, their right to protection

was vested, and they were not required to post new notices every time the personnel of the lessee company changed. (Marshall vs. Cardenell, (Ore.), 80 Pac., 652.)

The Court, in the case last cited, speaking through Mr. Justice Wolverton, on page 653, said:

> "The statutory manner of giving notice is by posting a written announcement; presuming, no doubt, that when once posted it will remain a sufficient length of time to impart knowldge to the persons it is intended to affect. The language is not 'to keep posted,' but 'to give notice by posting' . . . . but if posted in good faith with the intention and purpose that it should remain as long as a notice would remain in a place of that nature under ordinary conditions, it would seem that the intendment of the statute had been observed and the notice given."

Section 694 of the Compiled Laws of Alaska, hereinbefore set forth in full, only provides that within three days after the owner has obtained notice of the work being done he shall *"give notice that he will not be responsible for the same, by posting a notice to that effect in some conspicuous place upon the land,"* etc. There is no provision for keeping the notice posted or for posting more than one notice.

In the case at bar, the *three* notices posted were durable, being printed on cloth and not susceptible of being quickly faded or obliterated by the action of the elements, and they remained *permanently* posted. The most noticeable feature of said notices was a statement in larger type than the balance of the instrument: "WILL NOT BE LIABLE," and the body of the instrument dis-

closes who would not assume liability, to-wit, the "Reliance Mining Company," and for what they would not be liable, to-wit, "labor and supplies." If the rights of the lessors were fixed on 25 January, 1913, when the notices were posted, by what authority could the Alaska legislature legislate their contractual rights out of existence?

The final analysis of the Court's reasons for giving judgment against appellants is found in Finding 4 (Tr., p. 283), where the sole ground of the decision is based upon the alleged failure of the Reliance Mining Company to post three notices containing *"the name or names of the lessee or lessees or other persons operating said property."* The same finding recites that the lease under which Spalding was operating the mine was not recorded. Therefore, the lease of 3 June, 1913, which *was* recorded, is *not* the lease under which he was operating, and the Court must have been satisfied that he was operating under a verbal extension of an expired lease that could not have been recorded, as the evidence shows that Spalding only had two leases; the recorded lease not going into effect until Jan. 1, 1914, long after all labor described in the complaint was performed.

Section 3 of the Act in question does not make failure to *record* a lease evidence of the consent of the owner that his ground shall be charged with the debts of the lessee, but *failure to post notices, containing, among other matters, the name of the lessee*, etc. *The plaintiff and his assignors knew the name of the lessee*, for they allege it in their liens and complaint; hence, what further information did they desire?

The Court does not find that the Reliance Mining Company failed to *post* notices disclaiming liability, but expressly finds that such notices were posted, but bases his decision *solely* upon the ground that the *lessees' names* were not contained therein. If, when a notice is once posted properly, the law has been complied with, as held by Mr. Justice Wolverton in 80 Pac., 602, heretofore cited, and if the lease was recorded, and the lessee's name was put in the notice, the lessee should sell his interest in the lease without lessor's knowledge, would lessor be required to post new notices immediately, telling about it? Must he perform a possible impossibility and be forced to record the assignment concerning which he may have no notice and in which he has no interest?

In the event of an assignment of lease, notices good when posted would not contain the name of the lessee thereafter operating, and presumably, under the ruling of the lower Court in the case at bar, the lien would be good and the laborer or miner who was theretofore precluded from filing a lien could then claim ignorance of his employer and hold the property under the lien.

Is the laborer, miner, etc., charged with *any* knowledge in regard to whom he is working for or by whom he is employed? Is he supposed to make *any* inquiries about the status of his employer? Or is he such a favorite of the Courts and the legislature that he is not required to exercise any of the intelligence with which he has been endowed by Nature? Is he to be classed with the idiots, incompetents, indigents, Indians, and other wards of the Government and the Territory and

have all his thinking done for him? Or is he required to exercise some little discrimination in the choice or acceptance of employment? Is he permitted to accept employment when he has no reasonable expectation of getting his pay, and, when the expected happens, look to someone else for his wages, because a notice of nonliability did not contain information he already possessed?

III.

Where lienable and nonlienable items are inseparably commingled in a notice of lien it is void.

The trial Court was in error in overruling defendants' motion to require the complaint to be made more definite and certain by a segregation of items, showing the amounts claimed for the different characters of work enumerated in the complaint. Assignments of Error iii. (See sec. 908, Comp. Laws of Alaska, hereafter set forth.)

If chapter 13, Session Laws of Alaska, 1913, is void, this question is unimportant.

If the said Act was valid and the lien-notices posted by the defendant below were sufficient to avoid liability under the liens, the question here presented is important only as establishing a rule of practice.

But in the event the Act was held void, the notices must have been sufficient. Even then, as a matter of pleading, before the defense of liability avoided by post ing of non-liability notices was interposed, under the general lien law of Alaska that would then be in force

in Alaska, defendant was entitled to favorable action on the motion, as the notices contain a lumping charge for labor in (a) prospecting (b) mining, the latter work and other labor described therein *not* being lienable.

Pioneer Mining Co. vs. Delamotte, 185 Fed. 752.

Andrews vs. Ladd, 188 Fed. 313.

Noble vs. Gustafson, 204 Fed. 69.

These are all Alaska cases, all construing sec. 691, Comp. Laws of Alaska.

In support of the proposition that when lien-notices contain a lumping charge, including lienable and non-lienable items, no lien attaches unless they are capable of segregation, see:

Gett vs. Ames (Ore.), 48 Pac. 355.

Gordon Hdwe. Co. vs. San Francisco et al. (Cal.), 22 Pac. 406.

Harrisburg vs. Washburn (Ore.), 44 Pac. 390.

Dallas Lumber Co. vs. Waco Woolen Mfg. Co., 3 Ore. 527.

Williams vs. Toledo Coal Co., 36 Pac. 159.

Allen vs. Elwert, 44 Pac. 823-826.

Hughes vs. Lansing, 55 Pac. 95-97.

Morris vs. Marsh, 3 Alaska 140.

2 Jones on Liens, secs. 1322, 1409, 1419.

In the case of Ahlmark, 25th cause of action, (Trans., pp. 93-97), all of his work was teaming, for which there is no lien under the old law. (Comp. Laws of Alaska, sec. 691, supra.)

The same is true of Mrs. Deck, 20th cause of action (Tr., 75-79), as she was cooking and nothing else.

ASSIGNMENTS OF ERROR NOS. I AND II.

No. I.—Since the action was instituted under the provisions of chap. 79 of Alaska Session Laws of 1913 and there is no provision therein for filing a lien, and as it is an independent act and does not provide for the recovery of cost of preparing or filing liens, and has no provision for attorney's fees, paragraphs vi, viii and ix of each cause of action should have been stricken as irrelevant and redundant.

Sec. 908, Comp. Laws of Alaska, provides:

> "If irrelevant or redundant matter be inserted in the pleading, it may be stricken out on motion of the adverse party; and when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the Court may require the pleading to be made more definite and certain by amendment."

No. II.—The argument relative to the first Assignment of Error above, and the argument under par. 3, sec. 1 of this Brief, are applicable to this assignment.

OTHER ASSIGNMENTS OF ERROR.

There is no conclusion of law found by the Court upon which to base a judgment for foreclosure of the liens on the personal property described therein. (Exceptions, xxviii, xxix.) It will be noted that in the *conclusions of law* the Court utterly fails at any place to find that any lien extends to the personal property, although the *decree* orders certain personal property sold which includes personal property that is not even included in

the Act itself, for instance, tools, cables, etc.

The Court does not find as a conclusion of law that any lien attached to the Soo Mining Claim for any labor performed by the plaintiff or his assignors. (Assignment of Errors xxvi, xxvii, xxxii.) Our conception of the purpose of findings of fact and conclusions of law is that the findings of fact shall contain the decision of the Court upon the facts presented, and that from the facts as found by the Court the conclusions of law shall be drawn, and that the judgment is based upon the conclusions of law so found.

If our contention is correct, there was no foundation whatsoever for the judgment rendered in this case, as there are no conclusions of law upon which to base a decree for the sale of the mining claim except the general statement contained in the first conclusion of law, wherein it is said that all the claims of the various persons contained in the findings of fact, down to paragraph xxv, constitute a lien on the Soo Quartz Mining Claim in said findings described. Among the findings from i to xxv are findings dealing with various other subjects than claims of lien-claimants, and also dealing with the claims of W. L. Spalding, one of the defendants, in and to the fixtures, tools, etc. (Finding v.)

Finding xii is to the effect that John Curry performed 38 days' labor in the period between 30 September and 8 October, 1913, and we presume the Court will take judicial notice of impossibilities.

Referring a paragraph xxv of the Findings (and it can not be told from the first conclusion of law whether it

is inclusive or exclusive of said paragraph xxv), we find certain labor therein described, which by the fourth conclusion of law is held not to be covered by a lien.

We find by the 9th finding that $75.00 for each separate cause of action would be a reasonable attorneys' fee for the institution and prosecution of each of said causes of action, etc., and while in the first paragraph of the conclusions of law it is stated that said claim is a lien upon the ground, yet by the third conclusion of law the Court finds that no such lien exists.

By the seventh finding of fact we learn that each claimant paid $11.75 for preparing and filing for record his lien-notice, which was a part of the amount claimed by the plaintiff in the action, and which by the first conclusion of law is declared to be a lien upon the Soo Quartz Mining Claim; yet by the fourth conclusion of law the Court says that no lien exists for the preparing or filing of the lien-notices. At no place in the conclusions of law is any statement of any description made that any lien exists upon any of the personal property described in the judgment or in the complaint.

Defendants' motion to strike part of the proposed findings of fact and objections thereto should have been granted. (Assignments of Error, viii, ix, xi, xv, xvi.)

The portions of the proposed findings of fact that defendants asked to have stricken, as well as the amendments proposed by the defendants, were for the purpose of eliminating from said findings matters which can not be considered as anything but conclusions of law. We think that the mere perusal of the findings objected to

will convince the Court of the correctness of appellants' position without the necessity for citing any authorities.

One of the findings of fact established by the Court (Finding i) is to the effect that W. L. Spalding was in possession of, prospecting, developing, mining, etc., a portion of the Soo Quartz Mining Claim, and Finding vi is to the effect that said Spalding employed each of the lien-claimants. Defendants' motion to amend plaintiff's seventh finding, as shown by assignments of error xiii and xiv, should be granted, to show that the lien-notices as filed did not contain true statements of the person or persons by whom the lien claimants were employed.

If plaintiff was entitled to any judgment, it would only be upon the portion of the Soo Mining Claim actually being worked by Spalding under his lease from the Reliance Mining Company (Assignments of Error V, VI, X, XVII). This is on the theory that the act of the legislature was void, and if plaintiff was entitled to any lien whatever, it would be under the provisions of sections 691-692 of the Compiled Laws of Alaska. Under those sections it is only provided that the lien shall cover the building or other improvement, "together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof . . . . . and the mine on which the labor was performed or for which the material was furnished shall also be subject to the liens created by this Code," etc.

The mine in question was upon the westerly 300 feet of the Soo Mining Claim, which was the only portion of the claim that was being worked by the lessee, and as

that was apparently a sufficient area for him to carry on mining operations upon, there should have been no judgment of the Court for the sale of any other portion thereof. Had there been a lease on the balance of said claim, would the Court have said that the portion of the claim covered by the lease to some other person should be liable for the indebtedness, or is the indebtedness only chargeable against that portion of a mining claim upon which a mine is opened?

ASSIGNMENTS OF ERROR XXIII AND XXIV.

The Court finds as a fact that the defendant Spalding was not operating under the lease of 9 June, 1913, and therefore it should not have been admitted in evidence, and defendants' objections were well taken.

All the other assignments of error, with the exception of VII, have heretofore been considered directly, or, if not so treated, the argument is applicable thereto, and the conclusions drawn therefrom, appellants respectfully submit, support the text of the assignments.

As to assignment VII, we must perforce abandon it, as the question involved is more one of eyesight than fact, and, in our view of the case; as hereinbefore set forth, it is immaterial.

We regret the length of this Brief, but believe that the Court will justify our acts when it has read the Act in question.

On the other hand, the Court's decision on the points involved will doubtless have the effect of settling considerable litigation now pending; and one complete present-

ment of the matter in all its phases may avoid a number of appeals. The Alaska legislature in 1915 repealed the Act, but that did not wipe out the causes of action that arose before its repeal or settle pending litigation.

We submit that the trial Court was in error and that the cause should be reversed and the action dismissed.

Respectfully submitted.

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Dated Fairbanks, Alaska,

February 11th, 1916.